

USAWC STRATEGY RESEARCH PROJECT

**MAKING THE CASE FOR PREEMPTION:  
INTERNATIONAL LAW, SOVEREIGNTY, AND  
LEGITIMACY IN THE GLOBAL PURSUIT OF AL QAEDA**

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## ABSTRACT

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The events of September 11th have brought forth much debate as to how the US should best deal with the asymmetrical threat posed by Al-Qaeda, a non-state terrorist organization with global reach. Dialogue as how to best preempt Al-Qaeda attacks has focused on such issues as rescinding Executive Order 12333 (assassination ban) and whether Al-Qaeda should be dealt with as criminals or combatants. As this war is being fought on a global battlefield, international law, both conventional and customary, national sovereignty, and the ability of the US leadership to develop a shared vision of a compelling legitimate preemptive strategy all impact efforts to garner international support in developing the strategic maneuver necessary to target Al-Qaeda.



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## MAKING THE CASE FOR PREEMPTION: INTERNATIONAL LAW, SOVEREIGNTY, AND LEGITIMACY IN THE GLOBAL PURSUIT OF AL QAEDA

After the chaos and carnage of September 11th, it is not enough to serve our enemies with legal papers.<sup>1</sup>

- President George W. Bush

The events of September 11<sup>th</sup> have brought forth much debate as to how the United States should best deal with the asymmetrical threat posed by Usama Bin Laden (UBL) and Al-Qaeda, a non-state terrorist organization with global reach. There is little debate that to eliminate the conditions that created and sustained Al-Qaeda requires, over time, the synergistic effort of all the elements of US national power; however, the immediate threat of another 9/11 mandates a global response to preempt further attacks. Dialogue as to how to best prevent Al-Qaeda attacks has focused on such issues as rescinding Executive Order 12333 (assassination ban) and whether Al-Qaeda should be dealt with as criminals or combatants. As this war is being fought on a global battlefield, international law, both conventional and customary, national sovereignty, and the ability of the US leadership to legitimize the vision of a preemptive strategy all impact efforts to garner support in targeting Al-Qaeda.

During this paper I will argue that the case can be made that Al-Qaeda operatives are in fact combatants, targets under the rules of war, and that targeting of individual terrorists may not be assassination but a legal act in accordance with the self-defense provisions of United Nations Article 51 (conventional law). I will show how customary law is evolving to give states greater latitude to exercise self-defense and thus enable the United States to better address the Al-Qaeda asymmetric threat. I will also argue how the *jus ad bellum* (reason for going to war) criteria of *last resort* is the only resort to preempt future Al-Qaeda attacks.

Furthermore, I will argue that sovereignty is no longer absolute when a nation fails to take action against Al-Qaeda members operating within its borders. Specifically, as it relates to sovereignty, US soldiers may cross sovereign borders for the limited objective of eliminating the Al-Qaeda threat. Finally, I will argue the importance of legitimacy in building a preemptive strategy. Specifically, the United States leadership must focus on developing a shared vision of a preemptive strategy against Al-Qaeda as an organization, vice the amorphous Global War on Terrorism. By developing a shared vision the United States can garner international support which will facilitate the strategic maneuver necessary, through cooperation with other nations, to preempt further operational acts of terror.



## **ASSASSINATION DEFINED**

In its most basic form assassination involves the murder of a targeted individual for political purposes.<sup>2</sup> However, assassination is not a legal term; it does not appear in international law; it does not appear in the United Nations Charter; it does not appear in the Geneva Conventions; it does not appear in the Hague Conventions; nor does it appear within the scope of the International Criminal Court statutes.<sup>3</sup> Albeit not recognized in international law, the use of the word “murder” would lead one to conclude that assassination is in fact an unlawful act. What does appear in international law is the use of the term “lethal force.”

Lethal force is authorized in two circumstances – as a matter of law enforcement or under self-defense provisions of United Nations (UN) Article 51. What matters is the circumstance under which the application of force is used – peacetime or wartime. In the former, the pejorative definition of murder applies as the individual targeted would be denied “due process” under criminal law procedures. However, in the latter case, wartime, it could be lawful under the laws of war and thus not assassination.

## **EXECUTIVE ORDER 12333**

On 4 December 1981, President Reagan issued Executive Order 12333 on “United States Intelligence Activities.” Section 2.11 of Executive Order 12333 was a prohibition on assassination. Specifically, no one in the US Government, “shall engage in, or conspire to engage in assassination.”<sup>4</sup> Executive Order 12333, a continuance of previous orders by Presidents Ford and Carter, shows that it is ambiguous in that it does not define assassination or specifically distinguish the circumstances as peacetime or wartime, albeit all three president’s comments seemed to indicate the former condition (peacetime). On 4 January 2002, the Congressional Research Survey on Executive Order 12333 attempted to provide clarity to the President’s intent indicating, “it might be suggested that the assassination ban’s inclusion within an executive order on United States intelligence activities may serve to distinguish it from, and limit its applicability to, a use of military force in response to a foreign terrorist attack on United States soil or against United States nationals.”<sup>5</sup>

Is there such a thing as assassination during time of war? Yes, in the context of military operations there is one instance under the laws of war in which the term “assassination” is used that would indicate an unlawful act. If the act (assassination) were to be carried out in a “treacherous manner” it would be considered unlawful.<sup>6</sup> Army Field Manual 27-10 describes “treacherous” as putting a price upon an enemy’s head, as well as offering a reward for an enemy, dead or alive. It does not, however, preclude surprise attacks on individual soldiers or

officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.”<sup>7</sup> When applied against enemy combatants in a “non-treacherous way,” the term assassination does not apply as it is the legal use of lethal force. Combatants are liable to attack irrespective of location or activity – the critical requirement is in determining if the target is a combatant.

## **COMBATANTS OR CRIMINALS**

In determining Al-Qaeda’s status as criminal or combatant, legislative attorneys for the US Congressional Law Division proposed that two questions must be answered. First, is there an armed conflict between the United States and Al-Qaeda? Second, do the events of September 11<sup>th</sup> constitute an act of war?<sup>8</sup> It is important to point out that it is not the purpose of this paper to examine whether Al-Qaeda operatives abide by the laws of war and should be considered “legal combatants” and therefore be granted POW status – but only to establish their status as combatants.

While no sovereign nation has issued an official declaration of war since WWII, President Bush said the attacks on the World Trade Center were “the beginning of the first war of the 21<sup>st</sup> century” and he was authorized by Congress to use, “all necessary force.”<sup>9</sup> Moreover, UBL, Al-Qaeda’s leader, has publicly issued numerous fatwas (legal decrees) calling for the destruction of the United States. One such fatwa, issued on 23 February 1998 reads, in part, as follows:

...to kill Americans and their allies, both civil and military, is an individual duty of every Muslim who is able, in any country where this is possible, until the Aqsa Mosque (in Jerusalem) and the Haram Mosque (in Mecca) are freed from their grip and until their armies, shattered and broken-winged, depart from all the lands of Islam, incapable of threatening any Muslim.<sup>10</sup>

As one party to this conflict is a non-state actor, it is difficult to account for its actions within the construct of the Westphalian nation state system as international law has not kept pace with changes in the international environment. “Just War” expert George Weigel makes the point we must think outside the Westphalian box and “recognize that Al-Qaeda and similar networks function like states, even if they lack certain attributes and trappings of sovereignty traditionally understood.”<sup>11</sup> Furthermore, congressional jurists argue, from a legal standpoint, that it may be possible to extrapolate the existence of armed conflict based solely on the actions of the sovereign state. Therefore, if the actions of the sovereign are “sufficient to rise to the level of armed conflict in the view of the international community” that would be sufficient to settle the issue.<sup>12</sup> Additionally, NATO provided legitimacy to the fact that a state of armed conflict exists between Al-Qaeda and the United States by invoking Article V of the Washington Treaty<sup>13</sup> on 4 October 2001 when it was determined that the September 11<sup>th</sup> attack was directed from abroad.

Difficulty also exists in defining the September 11<sup>th</sup> attacks as acts of war in the traditional sense of “use of force or other action by one state against another.”<sup>14</sup> In most cases terrorist acts are disparate events and “not seen to be an act of war unless it is part of a broader campaign of violence directed against the state.”<sup>15</sup> In the former case these isolated actions would be considered criminal acts. However, the events of September 11<sup>th</sup>, coupled with the Al-Qaeda attacks on US diplomatic missions in East Africa (Kenya and Tanzania) and the Cole bombing in Yemen, represent coordinated attacks whose culminating events of 11 September 2001 alone could qualify as an act of war. To consider the events of September 11<sup>th</sup> a crime is to assume “there is some kind of set-down, normative international order than can somehow deal with it in a convincing and viable way and that simply does not exist.”<sup>16</sup> Furthermore, the political and ideological purpose of the aforementioned attacks distinguishes them from criminal acts.<sup>17</sup> St. Mary law professor, Jeffrey Addicott, says that the virtual Al-Qaeda-state is “beyond legal dispute” as they are aggressors and enemy combatants, and that actions taken by the US can be justified if exercised in accordance with the principles of Article 51, self-defense, of United Nations Charter.<sup>18</sup>

### **TARGETING INDIVIDUAL TERRORISTS**

Given the fact the case can be made that a state of war exists between the United States and Al-Qaeda, that Al-Qaeda engaged in armed conflict against the United States, that Al-Qaeda operatives are combatants, can we target individual Al-Qaeda terrorists? The law does not discriminate in the means by which a combatant is lawfully targeted. There is no distinction between “an attack accomplished by aircraft, missile, naval gunfire, artillery, mortar....or a single shot by a sniper. If the person attacked is a combatant, the use of a particular lawful means for attack cannot make an otherwise lawful attack either unlawful or assassination.”<sup>19</sup> There is however, a moral aspect to targeting as outlined in the “Just War Tradition” of *jus in bello* that emphasizes that the individual targeted must be a combatant (principle of discrimination...which we have established) and that the means of attack is proportional (emphasis here being on the need to limit collateral damage of non-combatants). Having met the aforementioned conditions it is therefore reasonable to presume that preemptive strikes against Al-Qaeda operatives, based on an imminent threat and sound intelligence, is not assassination (an unlawful act) but the legal targeting of a combatant.

An example of the aforementioned argument can be illustrated in the targeting of Al-Qaeda operative Qaed Sanan al-Harethi. In November 2002, al-Harethi was killed in the Marib (an ungoverned tribal area of Yemen) from a CIA launched hellfire missile strike. Al-Harethi

was one of Al-Qaeda's top officials in Yemen and believed to have been behind the bombing of the USS Cole. Unsurprisingly, questions about the Bush administration having violated EO 12333 quickly followed Deputy Secretary of Defense Paul Wolfowitz's acknowledgement of US involvement in the strike against al-Harethi. American Bar Association representative and former deputy general council with the CIA, Suzanne Spalding characterized the US operations, "as a military action against enemy combatants which would take it out of the realm of assassination." Moreover, that this is "...not a rhetorical war - these are enemy combatants. You shoot to kill enemy combatants."<sup>20</sup> Having declared war on the United States, targeting Al-Qaeda is a matter of self-defense.

## INTERNATIONAL LAW AND PREEMPTION

Unlike terrorists....we do not believe the end justifies the means. We believe in the rule of law. This nation has long been a champion of international law.<sup>21</sup>

- Former Secretary of State George Shultz

Sources of international Law are divided into four categories (in order of precedence): first, conventions, treaties, and agreements (i.e., the UN Charter); second, the practice of states (customary international law); third, principles of law recognized by leading "civilized" nations; judicial decisions and writings of jurists; and finally, scholars (i.e., International Court of Justice and International Criminal Tribunals for the Former Yugoslavia).<sup>22</sup> As US Army War College legal professor Tom McShane points out, "international law constitutes an important element of the geopolitical environment, one we ignore at our peril."<sup>23</sup> Germane to this analysis is an examination of the circumstances by which the UN condones an armed response (conventional international law), subsequent UN Resolutions specific to the aforementioned conflict, and how the historical evolution of customary international law increasingly conflicts with conventional international law. Finally, it is necessary to examine preemptive self-defense in the context of the Just War Tradition *jus ad bellum* (reason for going to war) criteria of *last resort*.

The UN was founded upon a post World War II (WWII) paradigm for the purpose of keeping the peace, by establishing a "normative order that would severely restrict the resort to force" between states.<sup>24</sup> Under Article 2(4) states are to "refrain in their international relationships from the threat or use of force against the territorial integrity or political independence of any State or in any manner inconsistent with the purposes of the United Nations."<sup>25</sup> There are two exceptions to the UN Charter for the use of force. Under Article 42

the Security Council can authorize the use of force against another state if there is a “threat to peace, breach of the peace, or acts of aggression.”<sup>26</sup> The other provision, Article 51, permits self-defense in the event of an armed attack.

## SELF-DEFENSE

There is no question but that the United States of America has every right, as every country does, of self-defense, and the problem with terrorism is that there is no way to defend against the terrorist every place and every time. Therefore the only way to deal with the terrorist network is to take the battle to them. That is in effect self-defense of a preemptive nature.<sup>27</sup>

- Donald Rumsfeld

Article 51 of the United Nations Charter provides for the inherent right of individual or collective self-defense if an armed attack occurs and when an armed attack is imminent. The difficulty is determining, when sufficient information exists to prove the threat is in fact “imminent.” The legal benchmark for defining “imminence” has been the Caroline Incident of 1837 when British troops attacked the ship Caroline containing US citizens taking supplies to Canadian rebels fighting the British. In the 1840’s US Secretary of State, Daniel Webster, using the Caroline incident, outlined the criteria that would become the international law standard. Webster argued that, “the use of force in self-defense is justified when the need for action is “instant, overwhelming, leaves no choice of means, and no moment for deliberation.”<sup>28</sup> Article 51 also reveals that self-defense is authorized only as an interim measure until such time “the Security Council has taken measures necessary to maintain international peace and security.”<sup>29</sup>

There are two important differences between the temporal relationships that exist in establishing the “imminence” of the threat; one being preventive, the other preemptive. Preventive self-defense is best described as a strategic first strike that precludes the “perceived belligerent” from developing a capability that it may later use during war to threaten the belligerent who launched the preventive strike. Preemptive, however, is more at the tactical level when an attack is thought to be imminent and the intent is to deny the belligerent the ability to deploy an existing force (capability it already has) to commit a hostile operational act.

As Al-Qaeda is a non-state terrorist organization there are inherent complexities in determining the “imminence” of an ostensibly global asymmetrical threat. It is also equally difficult for the United States to determine when that threat no longer exists. Al-Qaeda presents an amorphous threat that portends to exist for an indeterminate time. The nature of the threat

lends credence to the argument that the “imminence” of an Al-Qaeda terrorist attack can exist in perpetuity, until such time as Al-Qaeda ceases to exist as an organization.

In Michael Walzers’ seminal work “Just and Unjust Wars,” he attempts to draw the line between legitimate and illegitimate preemptive strikes. Walzer lays out three criteria that should be used in determining when to take action: “a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk.”<sup>30</sup> Using Waltzer’s criteria, the case can be made that UBL’s fatwas are a clear statement of intent to injure. While determining the state of operational planning is more problematic, the United States, in conjunction with other nations, continues to uncover pre-operational planning as well as suffer attacks by Al-Qaeda and Al-Qaeda associated operatives.

As the events of September 11<sup>th</sup> could be deemed an act of war; clearly the first strike has been made by Al-Qaeda and future acts by the United States could be called “anticipatory self-defense.”<sup>31</sup> In “The Conduct of Just and Limited War,” William O’Brien discusses the legitimacy of “anticipatory self-defense” when there is a clear and present danger of aggression – a threshold that Al-Qaeda has crossed.<sup>32</sup> Former British Attorney General Lord Twysden bolsters the argument of self-defense proposing that, “no state should be required to wait until an attack has in fact been launched. In all circumstances it will be enough to expect that a further devastating attack will be mounted (referencing September 11<sup>th</sup>).”<sup>33</sup> Moreover, Twysden goes on to say that once the perpetrators were identified, they became lawful targets and that America could launch a proportional attack within the doctrine of national self-defense.<sup>34</sup> UN Security Council resolutions, 1368 and 1373 reaffirmed the states’ rights, supporting the fact that “the right of self-defense is not an entirely passive right.”<sup>35</sup> As US Air Force Academy professor Martin Cook states, “there can be no question that violence on the scale of the September 11<sup>th</sup> events justifies the use of military force....to eliminate...if possible the agent’s capability.”<sup>36</sup>

Shortly following the attacks of 11 September 2001 the UN Security Council (UNSC) issued Resolutions 1368 (12 September) and 1373 (28 September). Both resolutions recognized “the inherent right of individual or collective self-defense in accordance with the Charter.”<sup>37</sup> Though Article 51 was not specifically mentioned, the phraseology makes clear it was implied. Resolution 1373 further obligated the UN’s 191 member states to “combat threats to international peace and security caused by terrorist activities by all means.”<sup>38</sup> While it could be argued the phrase “all means” indirectly endorsed military action, the UN did not become directly involved as the “operations were not aimed at a state, but rather terrorist cells operating

in Afghanistan.<sup>139</sup> However, “there is nothing in Article 51 of the UN Charter that requires self-defense to turn on whether an armed attack was committed by another state.”<sup>40</sup> It could therefore be argued by using the phrase “all means,” the UN established a new precedent expanding the use of force in self-defense to include not only sovereign states, but in this specific case, the Al-Qaeda virtual state. Problematic, however, is “the drafters of the UN Charter did not contemplate the existence of international terrorists”<sup>41</sup> and conventional international law has yet to develop a “comprehensive convention on terrorism.”<sup>42</sup> Where international law or treaties are lacking, states must pave new roads through their own practices to deal with the Al-Qaeda threat.

#### CUSTOMARY LAW

The practice of states over time is known as customary international law and second only to conventional law (treaties) according to Article 38 of the Statute of the International Court of Justice in deciding disputes.<sup>43</sup> Thus the behavior of states, over time, establishes norms, or modifies existing norms of behavior. Lee Feinstein, a senior fellow for US Foreign Affairs and International Law at the Council on Foreign Relations, argues that changing “self-defense norms through state behavior is legitimate. State practice is a valid way of changing the law.”<sup>44</sup> What is not defined is over how long a period of time until such norms are accepted in codified law. Also, where there is conflict, who is the final arbiter when norms and law are out of synch? Writing for the *Harvard Law Journal*, Michael Glennon characterizes the international system as existing in a parallel universe of two systems, *de jure* and *de facto*. Glennon describes the *de jure* system as consisting of illusory rules that would “govern the use of force among states in a platonic world of forms, a world that does not exist.”<sup>45</sup> The *de facto* system is described as “actual state practice in the real world, a world where states weigh costs against benefits in disregard of the rules all but ignored in the *de jure* system” which is disconnected from state behavior.<sup>46</sup>

History is replete with empirical data to support Glennon’s argument that the continuous nature of conflict, the *de facto* actions of states, in the international system since WWII has not been sanctioned by the UN and thus would appear in conflict with the *de jure* system. “Between 1945 and 1999, two-thirds of the members of the UN -126 states out of 189 – fought 291 interstate conflicts. Law professor Mark Weisburd noted, “state practice simply does not support the proposition that the rule of the UN Charter can be said to be a rule of customary international law.”<sup>47</sup> International Law expert Juliette Kayyem states it succinctly, in that, “we can all sit here and debate what falls into customary international norms...In the end, our legal

analysis is pretty much guided by our policy preferences.”<sup>48</sup> What Kayyem highlights is a positivist interpretation citing what Article 51 does not prohibit.

While states’ reactions to the changing international environment may not be reflected in conventional international law, how the world’s leading democracy, the United States, acts in regards to convention law sets the standard for other nations.”<sup>49</sup> The Bush Doctrine’s policy of preemption will likely serve as the “basis for other countries initiating or threatening conflicts they might not otherwise have been emboldened to undertake.”<sup>50</sup> Moscow has already seized the opportunity to invoke UN Resolution 1368 to justify military actions against Chechen rebels in Georgia – with or without the concurrence of the Georgian government.<sup>51</sup> Specifically, the case the United States makes to the international community for taking preemptive action, irrespective of the Al-Qaeda operatives’ location and if not clearly codified in law, must be compelling and moral. Using the positivist’s interpretation of self-defense in the international environment *de jure*, the case for legality, albeit important, is not the only consideration in preemption - a compelling moral case for preemption as a last resort must be clearly understood by the international community.

#### PREEMPTION AS A LAST RESORT

Unlike the Westphalian period, when the movement of armies foreshadowed threat, modern technology in the service of terror gives no warning, and its perpetrators vanish with the act of commission.<sup>52</sup>

- Former Secretary of State Henry Kissinger

The international law of war paradigm or “Just War Tradition” is a disciplined attempt to “relate the morally legitimate use of...military force to morally worthy political ends.”<sup>53</sup> The Just War Tradition consists of two parts. First, the “just” reason for going to war, *jus ad bellum*, the second, how we conduct “just” war, *jus in bello*. For purposes of this discussion I will focus on the issue of *jus ad bellum* as it relates to preemptive targeting of Al-Qaeda as a last resort of self-defense. *Jus ad bellum* stipulates that war is just if: the cause is just; war is undertaken by a legitimate authority; the intentions are just (for the greater good of peace); there is a public declaration of cause and intent; proportional in that the damage will not out-weigh the good to be achieved; there is a reasonable hope for success; and finally, the pursuit of war is taken only as a last resort. There is little debate that the UN condemnation of the Al-Qaeda attacks of September 11 or the UN’s call for the International Community to eliminate terrorism, as evident



in Resolutions 1373 and 1378, make this war just. Immediately following the September 11 attacks, 136 of the UN's 191 nations offered support to the United States.<sup>54</sup>

To make the case of last resort it is necessary to differentiate between Al-Qaeda, the virtual state, and a traditional nation state. The "last resort" means, "the government authority must reasonably exhaust all other diplomatic and non-military options for securing peace before resorting to force."<sup>55</sup> As Michael Walzer points out in, *Just and Unjust Wars*, "lastness is a metaphysical concept that is never really achieved because another effort to avert war can always be attempted."<sup>56</sup> While it would appear counterintuitive to argue preemption as a just last resort, any argument in regards to successful operations against Al-Qaeda must understand it is the only resort. Operating from the shadows in small clandestine cells, the imminent warning normally associated with the movement of military forces does not exist with Al-Qaeda. Lacking sufficient intelligence, more times than not, the only sign of an Al-Qaeda attack is the event itself. In the context of the traditional nation-state model, last resort assumes the possibility of deterrence, fear of retribution, containment, negotiation, surrender, or ample warning of an imminent attack that would allow a preemptive strike. "Having no territory, no nation, and no citizens to defend, neither deterrence nor retaliation means anything to Al-Qaeda."<sup>57</sup> While Al-Qaeda is able to avoid the traditional trappings of the nation state and the case can be made for preemption as a last resort, it is in the Westphalian pool of nation states that they swim. Inevitably, the issue of sovereignty comes to the fore as Washington attempts to pursue and eliminate Al-Qaeda's operatives and leadership.

## THE ISSUE OF SOVEREIGNTY

The time of absolute sovereignty has passed; its theory was never matched by reality.<sup>58</sup>

- Former UN Secretary General Boutros Boutros-Ghali

According to former US Secretary of State George Shultz, "we reserve, within the framework of our right to self-defense, the right to preempt terrorist threats within a state's borders – not just hot pursuit, but hot preemption."<sup>59</sup> The central question of sovereignty being, "can the victim state, in this case the United States, enter another state's territory in order to conduct self-defense operations against Al-Qaeda?"<sup>60</sup> There are four basic scenarios to this dilemma: entering the state upon invitation, open state sponsorship of Al-Qaeda, the state maintaining neutrality and denying support requested by the victim state; and finally, a failed

state with no recognized sovereign. It is the state denying support to the victim state, or unwillingness to take action, that is the most complex and bears further analysis. To answer this question it is necessary to understand the concept of sovereignty and the sovereign's responsibilities as part of the international state community. States who fail to comply with efforts to capture Al-Qaeda operatives may forfeit a degree of their sovereignty; the United States could pursue Al-Qaeda across state borders, so long as the intent of US actions are specifically against the terrorist organization and do not threaten the sovereign itself.

The traditional definition of sovereignty is "the enabling concept of international relations whereby states assert not only ultimate authority within a distinct territorial entity but also assert membership of the international community."<sup>61</sup> Throughout history sovereignty has been reflected in "two broad movements: first a centuries long evolution toward.....sovereign states; second, circumspection of absolute sovereign prerogatives in the second half of the twentieth century."<sup>62</sup> Historically, sovereignty was described as "internal and external" in that no one external to the nation should cross the sovereign's border to address an internal issue of state."<sup>63</sup> Today, the rise of transnational threats like Al-Qaeda, create a symbiotic relationship of shared security and therefore shared responsibility between states. Based on UN definition, violating sovereignty requires "a threat to a country's territorial integrity, political independence, human rights, peace, or self-determination" which, if not an objective of targeting Al-Qaeda, could therefore not be considered a violation of sovereignty.<sup>64</sup>

It is in the failure or unwillingness of a state to take action against an international threat to peace, Al-Qaeda, that the circumspection of sovereignty occurs; specifically under the rubric of the victim state's inherent right of self-defense. UN resolutions 1378, 1386, and 1390 all called for member states to "root out terrorism."<sup>65</sup> If states do not take action against conditions that are threatening to other members, those states "cannot expect protection or even recognition of their own rights, including sovereignty."<sup>66</sup> As noted in the Lotus case, "it is well settled that a state is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people."<sup>67</sup> If the state is not willing to take action against Al-Qaeda operatives then the victim state is permitted to enter the state but only for the objective of dealing with the Al-Qaeda threat - immediately withdrawing after the operation.<sup>68</sup> Furthermore, while it would seem self-evident, it should be emphasized that such operations must be precise in every aspect, with compelling intelligence warranting offensive operations.

While sovereignty may not longer be absolute, the Westphalian system is still alive and it remains in our national interest that it survives, albeit the future will no doubt see more change. In a speech to the Foreign Policy Institute, former Secretary of State George Shultz cautioned

that, “first and foremost, we must shore up the state system. The world has worked for three centuries with the sovereign state as the basic operating entity.”<sup>69</sup> Nevertheless, while operating in Westphalian system is preferred, the evolution of customary law notwithstanding, a self-defense strategy to eliminate the Al-Qaeda threat may necessitate cross border operations – operations that will require political strategists to carefully weigh second and third order effects as well as risk. We cannot be so naïve to think cross border operations are not without consequence; “we do not operate in a vacuum.”<sup>70</sup> Operations against Al-Qaeda, and governments that support or harbor them, “will be challenged by competing considerations – such as fear of entanglement in regional geopolitical relations, intra-state relations, or strategic economic relations with terror-sponsoring states.”<sup>71</sup>

Pakistan provides an example of both action and restraint in weighing second and third order effects as well as accepting risk in pursuit of Al-Qaeda. Pakistan has taken a very aggressive stance against Al-Qaeda and demonstrated tremendous resolve and operational success in its major urban areas. However, the Pakistani government has not been as effective along their western border with Afghanistan – the Federally Administered Tribal Areas (FATA). While the United States would no doubt like to embark on operations in the FATA, by allowing a US military presence in the FATA, President Musharref’s political future could be at greater risk. US military actions in the FATA, which Pakistani opposition parties could exploit as President Musharref bowing to US interests, could result in a coup that might put Islamic fundamentalist in power. Fundamentalist control of Pakistan could lead to exacerbating tensions with neighboring India and possibly significantly impact, if not end, the current urban anti-Al-Qaeda operations in Pakistan. In the case of military action in the FATA, restraint must be exercised and it is therefore understood that preemption, seen as unilateral action in Pakistan’s western territories, may not be acceptable. As it relates to Pakistan, the current US preemptive strategy must accept some risk granting Al-Qaeda a degree of safe haven in Pakistan’s FATA.

## **LEGITIMACY**

If the Security Council gave America its authority to attack Iraq, the war would become legal but for many people it would still be illegitimate.<sup>72</sup>

- The Economist, February 22, 2003

Comments above are meant to highlight that irrespective of the legal determination of a preemptive strategy, achieving legitimacy in the eyes of the world also requires some

preponderance of nations to support that strategy. Thus far, I have argued the legal merits that could justify global US preemptive military action against Al-Qaeda. I have argued the following from a legal standpoint: we are in a state of war with Al-Qaeda; they are combatants; self-defense is justified according to both conventional and customary law; preemption is the only resort; and in certain circumstances, operations against Al-Qaeda could take precedence over issues of sovereignty. While important, the aforementioned legal arguments can be significantly muted without some semblance of legitimacy as expressed by the cooperative support of other nations. While current international legal standards dealing with terrorism are the subject of much debate, international legitimacy can significantly buttress a preemptive strategy and enable our strategic maneuver in the war against Al-Qaeda.

Legitimacy also supports other US instruments of power, it helps facilitate global cooperation and it garners favorable public opinion. As former Under Secretary of Defense for Policy, Walter B. Slocombe stated, from a domestic perspective, "the American public has more confidence that the decisions of its government are right if they are shared by other countries..."<sup>73</sup> I will next examine the potential for the primacy of legitimacy over legality and argue why the US must develop a clear vision that can be shared by other nations to garner international support to buttress the legitimacy of a preemptive strategy and facilitate greater strategic maneuver in the war against Al-Qaeda.

#### LEGITIMACY'S PRIMACY OVER LEGALITY

In Federalist No.3, John Jay captures the importance of legitimacy, as expressed through opinion, when he said, "the American Declaration of Independence begins by acknowledging the importance of a decent respect to the opinions of mankind."<sup>74</sup> Robert Tucker, Professor Emeritus of American Foreign Policy at John's Hopkins, expands on the importance of favorable opinion as an expression of legitimacy over legality:

Legitimacy arises from the conviction that state action proceeds within the ambit of law, in two senses: first, that action issues from rightful authority, that is, from the political institutions authorized to take it; and second, that it does not violate a legal or moral norm. Ultimately, however, legitimacy is rooted in opinion, and thus actions that are unlawful in either of these senses may, in principle, still be deemed legitimate. Despite these vagaries, there can be no doubt that legitimacy is a vital thing to have, and illegitimacy a condition devoutly to be avoided.<sup>75</sup>

While formal bodies such as the UN are sorting out the new threat environment to determine what is legal, the ultimate judge of what is right is the international community, thus what

appears legitimate is to some degree a function of opinion or the expression of support from other nations.

The NATO bombing of Kosovo is an example of legitimacy's primacy over legality. In 1999, NATO led a bombing campaign against Kosovo to stop the killing of ethnic Albanians. The military action was conducted without the authorization of the UN Security Council. A special eleven-member international commission was established, the same year, to determine the legality and legitimacy of the NATO bombing. In 2000, the head of the commission, South African Justice Richard Goldstone, concluded among other findings that, "the NATO action was not legal, but it was legitimate."<sup>76</sup> The ruling enforced an opinion that the prevailing sentiment that the actions of the Yugoslavian government should be stopped, a legitimate act, even though the UN Security Council did not sanction intervention. So, what is the prevailing international opinion regarding the legitimacy of preemptive action against Al-Qaeda?

On 11 September 2001, nearly 3000 people, representing 115 nations, were killed in the attack on the World Trade Center.<sup>77</sup> On 13 September, the French newspaper headline read, "We are all Americans," signaling to the world that a great injustice had been done, not only to the United States, but to the international community. The year following the attacks would see more than 180 nations offer or provide assistance to the United States during Operation ENDURING FREEDOM.<sup>78</sup> Legitimacy for the United States to strike against Al-Qaeda seemed to be emblazoned in the consciousness of the free world. However, over the past two years the legitimacy of the Administration's vision of a preemptive strategy, writ large, has come under criticism by other nations and thus portends to threaten the effectiveness of the war against Al-Qaeda.

#### DEVELOPING A SHARED VISION

In their article, "Sources of American Legitimacy," foreign policy professors Robert W. Tucker and David C. Hendrickson argue that US legitimacy is based on four pillars that were manifest in the role America reluctantly undertook immediately following World War II. The four pillars of American legitimacy being "its commitment to international law, its acceptance of consensual decision-making, its reputation for moderation, and its identification with the preservation of peace."<sup>79</sup> What Tucker and Hendrickson are arguing as American legitimacy are characteristics of sound strategic leadership. As Michael Mazarr explains, "a leader's most important job is to rally people towards a clear and specific vision," and "the most lasting visions are shared ones."<sup>80</sup> In the case of the war against Al-Qaeda, the first step in establishing the legitimacy of a preemptive strategy is creating a shared vision to rally the international

community. The aforementioned vision must be clear – it must articulate who is the enemy, what is the mission, and what is the end state.

To date, we have not created a shared vision focused on Al-Qaeda but an amorphous campaign against terrorism that is “unattainable and strategically unwise.”<sup>81</sup> Legitimacy in the war against Al-Qaeda has been stifled under the rubric of the greater Global War on Terrorism and overarching statements that you are either with or against us. As described by former Secretary Kissinger, “American foreign policy is more comfortable with categories of good and evil...”<sup>82</sup> Jeffrey Record notes that we have violated the fundamental strategic principles of discrimination and concentration because “the Global War on Terrorism is directed at the phenomenon of terrorism, as opposed to the flesh-and-blood terrorism organizations, it sets itself up for strategic failure,” does not rally international support, and creates uncertainty and fear.<sup>83</sup> Strategists Stephen Van Evera expands Record’s argument:

It should have been a war on Al-Qaeda. Don’t take your eye off the ball. Subordinate every other policy to it, including the policies toward Russia, the Arab-Israeli conflict, and Iraq. Instead, the Administration defined it as a broad war on terror, including groups that have never taken a swing at the United States and never will. It leads to a loss of focus....And you make enemies of people you need against Al-Qaeda.<sup>84</sup>

Creating the foundation of a shared vision sets the conditions for legitimacy around which we can rally international support, develop trust, and bely fears that preemption is a panacea for unilateral US action but rather a coherent strategy against an asymmetric threat that necessitates international cooperation. Author Thomas Bennett, in *The Pentagon’s New Map* describing the lack of shared vision states that “our problem right now is not our motive or our means, but our inability to describe the enemies worth killing, the battles worth winning and the future worth creating.”<sup>85</sup>

While the intent of a shared vision is to create a multilateral approach, it is important to point out that the difference between unilateralism and multilateralism is largely “an illusory one” and that “in the end, all decisions on the use of military force are unilateral.”<sup>86</sup> Every nation will make its own, unilateral, decision whether or not to support a preemptive strategy against Al-Qaeda – it is the effect of the conflation of the preponderance of nations supporting such a strategy that, in the end, gives it a sense of international legitimacy. However, it is the exercise of US leadership in creating a clear shared vision that promotes unilateral support from each nation that will give the US greater strategic maneuverability through collective cooperation to execute preemptive operations against Al-Qaeda. Nevertheless, the United States reserves the right to act alone, preemption is not meant to tout unilateralism, in the pejorative sense, as

having primacy in the US strategy. As National Security Advisor Rice points out, “this approach, unilateralism, must be treated with great caution. The number of cases in which it might be justified will always be small.”<sup>87</sup>

## CONCLUSION

During the course of this paper I have presented an argument to establish Al-Qaeda’s status as combatants, the legal guidelines that support a preemptive self-defense against Al-Qaeda, and that the United States must develop a shared vision of the war against Al-Qaeda to help legitimize the strategy of preemption. Specifically, I have argued that Al-Qaeda members are not criminals but legal combatants and that preemptive targeting of these terrorists by the United States is legal under Article 51 of the UN (conventional law) and, if not carried out in a treacherous way, per the laws of war, is not considered assassination. I have defined assassination as an unlawful act, examined the intent of US Executive Order 12333 to preclude such acts during peacetime, and that there is no need to rescind this executive order to deal with the Al-Qaeda threat given their combatant status. I have outlined the legal status of Al-Qaeda as combatants vice criminals, based on the fact that Al-Qaeda has met the criteria of having engaged in armed conflict against the United States and the persistent nature of those attacks are of sufficient magnitude to determine a state of war exists between Al-Qaeda terrorists and our country.

In addition to conventional law, specifically Article 51 of the UN Charter, I have argued that customary law, the behavior of states, is evolving toward greater acceptance of acts of self-defense with the advent of such transnational threats as Al-Qaeda. Also, that the customary behavior of the United States, as it relates to preemption is of great importance, as it will likely become the basis for other nations to act. Therefore, it is paramount that our argument for preemption be compelling and moral. In that vein, I have argued that, as it relates to the reason for going to war, the *jus ad bellum* criteria of “*last resort*” is the only resort to preempt future attacks as Al-Qaeda is not subject to the normal deterrence means associated with a nation state. I have also argued that sovereignty is no longer an absolute concept. Nations have responsibilities as part of the international community to capture Al-Qaeda terrorists operating within their territory. Therefore, if a nation fails to comply with the UN resolutions to bring Al-Qaeda operatives to justice, the victim state may launch operations within another nation’s territory - but only for the objective of striking the aforementioned Al-Qaeda operatives.

Finally, I have argued that while the legal aspects of a preemptive strategy are important there is also a need to achieve a degree of legitimacy. Specifically, legitimacy expressed

through the opinions of nations can, in some instances, take precedence over legality. Moreover, legitimacy is desired as it can significantly strengthen a preemptive strategy, providing the United States greater strategic maneuver through the cooperation of other nations. Specifically, in order to develop legitimacy for a preemptive strategy we must have a more focused and shared vision of a war against Al-Qaeda as an organization, not the amorphous Global War on Terrorism. It can then garner international support, achieve legitimacy, and thus implement the strategy necessary to preempt further terrorist acts.

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